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collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

**CYNTHIA M. LOCKE**  
**WILLIAM N. IVERS**  
Stewart & Irwin, P.C.  
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

**ROBERT E. PAUL**  
Paul, Reich & Myers, P.C.  
Philadelphia, Pennsylvania

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**IN THE  
COURT OF APPEALS OF INDIANA**

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TH AGRICULTURE AND NUTRITION, LLC, )

Appellant-Defendant, )

vs. )

CHARITY NEVIUS, Personal Representative of )  
the Estate of GARY NEVIUS, Deceased, )

Appellee-Plaintiff. )

No. 49A02-0608-CV-671

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Kenneth H. Johnson, Judge  
Cause No. 49D02-9801-MI-0001-297

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**August 31, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

TH Agriculture and Nutrition, L.L.C. (“THAN”) brings this interlocutory appeal from the trial court’s denial of its motion for summary judgment on the claims of Charity Nevius (“Nevius”), Administrator of the Estate of Gary Nevius.<sup>1</sup> We address a single dispositive issue on review, namely, whether the trial court properly determined that the ten-year statute of repose contained in Indiana Code Section 34-20-3-1 does not apply to Nevius’s cause of action.

We reverse.

## FACTS AND PROCEDURAL HISTORY

THAN was formed in 1998 and is the successor by merger to TH Agriculture and Nutrition, Inc., formerly known as Thompson-Hayward Chemical Company (“THCC”). THCC did not mine asbestos. THCC did not manufacture asbestos-containing products. However, on behalf of Carey-Canadian Mines, Ltd. (“Carey”), THCC did distribute to portions of the United States various grades of chrysotile asbestos fibers. Those distributions all occurred between April 1, 1960, and June 1, 1980. Additionally, between April of 1963 and May of 1967, THCC maintained a distribution facility in Indianapolis. Carey is currently in bankruptcy.

Sometime between 1945 and the present, Gary was exposed to raw asbestos fibers while working in Indiana. On March 4, 2004, Gary was diagnosed with mesothelioma as a result of his asbestos exposure. Subsequently, on March 11, 2005,

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<sup>1</sup> We decide this case concurrent with Asbestos Corp., Ltd. v. Akaiwa, \_\_\_ N.E.2d \_\_\_, No. 49A02-0608-CV-676; TH Agric. & Nutrition, L.L.C. v. Akaiwa, \_\_\_ N.E.2d \_\_\_, No. 49A05-0608-CV-441; DAP, Inc. v. Akaiwa, \_\_\_ N.E.2d \_\_\_, No. 49A04-0608-CV-670; and Sun Chem. v. Akaiwa, No. 49A04-0608-CV-439.

Gary filed a complaint for damages naming numerous defendants, including THAN. Gary did not testify about THAN during his ensuing deposition.

On June 6, 2005, Gary filed his Amended Verified Initial Disclosure Statement, in which he stated that THAN “is the successor in interest to entities which distributed raw asbestos fiber from Cary . . . to the product defendants herein. . . . [THAN] is thus a mining company.” Appellant’s App. at 180. Gary died on July 23, 2005, and Nevius was substituted as Gary’s representative. On September 29, Nevius filed an amended complaint, alleging that THAN, among others, sold asbestos fiber to one or more of the product defendants, who then incorporated that fiber into their products and thereby exposed Gary to the asbestos. On May 4, 2006, THAN filed a Motion for Summary Judgment on the amended complaint. On June 23, the trial court generally denied THAN’s motion. The court certified its order for interlocutory appeal, which we accepted.

### **DISCUSSION AND DECISION**

When reviewing a grant or denial of summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 973 (Ind. 2005). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Id. All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the

moving party. Id. However, questions of law are reviewed de novo. See Tippecanoe County v. Ind. Mfrs. Ass’n, 784 N.E.2d 463, 465 (Ind. 2003).

Nevius maintains that THAN is a miner of asbestos because it is “required to stand in Carey’s shoes as its principal distributor” since Carey is bankrupt. Appellee’s Brief at 5. In support, Nevius cites Indiana Code Section 34-20-2-4,<sup>2</sup> which states:

If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer’s principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this chapter, the manufacturer of the product.

Ind. Code § 34-20-2-4 (West 2004) (emphasis added). Thus, Nevius argues that, since Carey is not subject to Indiana’s jurisdiction due to its bankruptcy and THAN was Carey’s principal distributor in Indiana, THAN should be held to Carey’s liability.

But Nevius ignores Indiana Code Chapter 34-20-3,<sup>3</sup> which provides the statutes of limitations and repose in product liability actions and specifically addresses asbestos-related actions. Specifically, Indiana Code Section 34-20-3-1 (“Section 1”) states, in relevant part:

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

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<sup>2</sup> Nevius’s citation to this section of the Indiana Code appears on page five of her brief. However, on page six she references “[t]he public purpose of 34-20-3-4.” As the Indiana Code does not contain a section 34-20-3-4, we assume that that reference was to section 34-20-2-4.

<sup>3</sup> We also note that Nevius’s table of authorities lists Indiana Code Sections 34-20-3-1 and 34-20-3-2 as being referenced “passim” in her brief. Appellee’s Brief at iii. However, Nevius’s only reference in her entire brief to either of those statutes occurs at the beginning of her argument when she frames the issue by quoting part of section 34-20-3-2(d)(1). Nowhere in her brief does Nevius provide substantive analysis or application of those statutes.

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

And Indiana Code Section 34-20-3-2 (“Section 2”) provides:

(a) A product liability action that is based on:

(1) property damage resulting from asbestos; or

(2) personal injury, disability, disease, or death resulting from exposure to asbestos;

must be commenced within two (2) years after the cause of action accrues. The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action.

(b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.

(c) A product liability action for property damage accrues on the date when the injured person knows that the property damage has resulted from asbestos.

(d) This section applies only to product liability actions against:

(1) persons who mined and sold commercial asbestos; and

(2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.

(e) For the purposes of IC 1-1-1-8, if any part of this section is held invalid, the entire section is void.

(f) Except for the cause of action expressly recognized in this section, this section does not otherwise modify the limitation of action or repose period contained in section 1 of this chapter.

As our Supreme Court has held: “the language used by the Legislature represents its conscious intent to subject to Section 2 only those persons who produce raw

asbestos—‘persons who mine[] and s[ell] commercial asbestos’—and leave those who sell asbestos-containing products within the ambit of Section 1.” Allied Signal, Inc. v. Ott, 785 N.E.2d 1068, 1073 (Ind. 2003) (alterations in original). Thus, if THAN both mined and sold commercial asbestos, Nevius could maintain her cause of action against THAN since that action was commenced within two years of the development of Gary’s asbestos-related disease and death. But if THAN is not a miner, Section 2 does not apply to Nevius’s action. In such circumstances, Section 1 would apply, and Nevius’s action would be barred by the ten-year statute of repose<sup>4</sup> since the action did not commence until more than twenty years after THAN’s last possible delivery of the product. Our Supreme Court’s express holding in Ott forecloses the application of Section 2 to non-miner defendants. See id.

Here, it is undisputed that THAN did not mine asbestos. Indeed, Nevius’s argument on appeal acknowledges that THAN is no more than a distributor of asbestos, but she then argues that Indiana Code Section 34-20-2-4 requires treating THAN as if it were also a miner.<sup>5</sup> But we expressly rejected that argument in Briggs v. Griffin Wheel

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<sup>4</sup> Notably, in Ott our Supreme Court also held that application of Section 1 “might be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed [the plaintiff] with an asbestos-related illness or disease within the ten-year statute of repose, yet [the plaintiff] had no reason to know of the diagnosable condition until the ten-year period had expired.” Ott, 785 N.E.2d at 1075. However, Nevius did not advance that argument either to the trial court or on appeal. As such, that argument is waived. See Reeder v. Harper, 788 N.E.2d 1236, 1240 (Ind. 2003) (citing T.R. 56(H)); Anderson v. Four Seasons Equestrian Ctr., Inc., 852 N.E.2d 576, 581 n.7 (Ind. Ct. App. 2006), trans. denied.

<sup>5</sup> Specifically, Nevius argues that we should treat miners, distributors, and manufacturers of asbestos equally in applying Section 2. In support, Nevius baldly states that THAN “even conceded . . . that a miner is the manufacturer of the raw asbestos.” Appellee’s Brief at 5. But that statement is not supported by the record. Rather, THAN stated to the trial court that Nevius “alleges [that] THAN ‘is to be considered the principal distributor of Carey and . . . is to be treated as a mining company.’” Appellant’s App. at 453. Thus, THAN merely rephrased Nevius’s arguments to the trial court; THAN did not concede that it was a miner.

Corp., 851 N.E.2d 1261, 1263-64 (Ind. Ct. App. 2006), in which we noted, among other things, that Section 34-20-2-4 explicitly applies only to Indiana Code Chapter 34-20-2, whereas the statute of repose of Section 1 and the miner exception of Section 2 are contained in Chapter 34-20-3. See I.C. § 34-20-2-4; Briggs, 851 N.E.2d at 1263-64. And, in any event, to accept Nevius’s argument would require this Court to disregard our Supreme Court’s clear holding in Ott, which read Section 2 to apply only to actual miners of asbestos. See Ott, 785 N.E.2d at 1073; Briggs, 851 N.E.2d at 1263-64.

Finally, amici Indiana Trial Lawyers’ Association (“ITLA”) and Defense Trial Counsel of Indiana (“DTCI”) dispute whether our Supreme Court’s analysis of Section 1 and Section 2 violates Article I, Section 23 of the Indiana Constitution. Article I, Section 23 of the Indiana Constitution provides that “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” ITLA contends that the “Ott interpretation of Section 2 is unconstitutional” because it treats similarly situated plaintiffs and defendants differently. ITLA’s Brief at 6, 8. On the other hand, DTCI argues that Section 2 does not violate Indiana’s Constitution.

ITLA’s arguments are unavailing. In Ott, our Supreme Court considered the constitutionality of its interpretation as applied to differently treated plaintiffs, stating:

[W]e find it unnecessary to determine whether the distinction is constitutionally permissible because the classification resulting from the distinction of which the plaintiffs complain . . . works in favor of asbestos plaintiffs. Asbestos plaintiffs are subject to the same statute of repose as other products liability claims with respect to all defendants other than persons who mine and sell commercial asbestos and certain bankruptcy funds. With respect to the latter two classes of defendants, asbestos

plaintiffs are not subject to a statute of repose at all. To the extent there is any art. I, § 23 defect, asbestos plaintiffs do not suffer any cognizable harm.

Ott, 785 N.E.2d at 1077 (footnote and citation omitted). Our Supreme Court then reserved the question of “Section 2’s constitutionality as applied to miners,” as the asbestos-defendant then before the court was found to not be a miner. Id. at 1077 n.11.

Again, Ott controls the issue presented. Insofar as amicus argues that we overturn our Supreme Court’s precedent regarding the application of Section 2 to asbestos-plaintiffs, “we are bound by our supreme court’s precedent.” See State v. Jackson, 857 N.E.2d 378, 381 (Ind. Ct. App. 2006). See also Horn v. Hendrickson, 824 N.E.2d 690, 695 (Ind. Ct. App. 2005) (“the Court of Appeals is well aware of the controlling precedents of our supreme court and has no desire to proceed in conflict with them. We are an intermediate appellate court.”). To the extent that ITLA maintains that we should reach the issue of Section 2’s constitutionality as applied to miners, we decline to address that argument since, again, THAN is not a miner. See Ott, 785 N.E.2d at 1077 n.11. Likewise, we need not address DTCI’s arguments given the facts and posture of this case.<sup>6</sup>

The parties and amici also dispute the trial court’s application of Jarboe v. Landmark Community Newspapers, 644 N.E.2d 118 (Ind. 1994), and the different summary judgment standards between Indiana and the federal courts. First, DTCI

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<sup>6</sup> In any event, even if we were to find Section 2 applicable but unconstitutional, THAN would be protected by Section 1’s statute of repose. Indiana Code Section 34-20-3-2(e) states that “if any part of [Section 2] is held invalid, the entire section is void.” But Indiana Code Section 34-20-1-3 states: “If a provision of this article or its application to a person or circumstance is held invalid, the invalidity does not affect other provisions or applications, and to this end the provisions of this article are severable.” Thus, if Section 2 were unconstitutional, it would be severed from Indiana Code Article 34-20, and Section 1 would remain intact as the only source of the statutes of limitations and repose applicable to Nevius’s cause of action.



maintains that “panels of this Court have interpreted Jarboe to mean that defendants must prove a negative in order to satisfy their summary judgment burden. Such an interpretation works a substantial injustice.” DTCT’s Brief at 5-6 (citations omitted). In response, ITLA asserts that “[i]t is hard to understand how . . . asbestos defendants can credibly argue here that the burdens placed upon them by Jarboe and the Trial Court are onerous, or even real.” ITLA’s Brief at 13. However, we need not address the contentions of the parties and amici concerning the operation and effect of Jarboe because THAN is protected by Section 1’s statute of repose.

In sum, we reverse the trial court’s denial of THAN’s motion for summary judgment. Because THAN is not a miner, Section 2 cannot apply to THAN, and Nevius’s cause of action is barred by Section 1’s ten-year statute of repose. Further, ITLA’s contention that the “Ott interpretation of Section 2 is unconstitutional,” ITLA’s Brief at 6, 8, is beyond the scope of our review. Nevius lacks a cognizable harm from which to challenge any constitutional defect, and THAN, as a non-miner, lacks standing to challenge Section 2.

Reversed.

RILEY, J., and BARNES, J., concur.